The Misguided Defenses of *Miranda v. Arizona*

Ronald J. Allen*

I am very pleased and honored to be here for a number of reasons. *Miranda v. Arizona*[1] is one of the most important cases that the Supreme Court has ever decided, and it is a distinct honor to be invited by a great law school in a great university to join a distinguished panel to celebrate its fortieth birthday. I am also honored to be here as the guest of the *Ohio State Journal of Criminal Law*, and its editors, Doug Berman, Joshua Dressler, and Alan Michaels, and Marc Spindelman who I take it was heavily involved in the planning of this event. With the hiring of these people and others over the last ten years to join with the distinguished faculty already in residence, The Ohio State University has moved to the forefront of criminal law and procedure scholarship in the United States, and the creation of a peer reviewed journal dedicated to criminal law and procedure scholarship has had a dramatically positive effect on the field as a whole. My colleagues at Northwestern have played a significant role in the contemporary move toward empirical legal scholarship, in which peer reviewed journals are the norm, and we are particularly aware of both the great contributions such journals make and their challenges. You have our thanks and our admiration.

Unbounded thanks and admiration are also the proper descriptors of the last reason I am both happy and honored to be here, and that is the opportunity it provides to share the podium with Professor Yale Kamisar. I have described at length the great debt that I owe to and great affection I have for him in the pages of your journal[2] and won't repeat it now. I will say, though, that the debt continues to grow.

To understand this point, I must tell you one thing about me and my work. My self-conceit is that of the scientist trying to advance knowledge rather than the moralist trying to convince you that my moral views are superior to yours. When I was approached to be on this panel and contribute to a symposium, my response was that I had already written what I had to say about *Miranda* and the Fifth Amendment privilege, and that I didn't have much to add. To which the reply was, come anyway (which, by the way, gave me some pause about this new peer reviewed journal of yours!). Until a week ago, I was truly at a loss as to what I might say, and then, like manna from heaven, Professor Kamisar's manuscript arrived,[3] and like so many other times in our relationship, he once again came to my rescue—thus the title of my paper, "The Misguided Defenses of *Miranda v. Arizona*."

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1 384 U.S. 436 (1966).

2 Ronald J. Allen, *In Praise of Yale Kamisar*, 2 OHIO ST. J. CRIM. L. 9 (2004).

3 Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163 (2007).

Time is short, so I must jump straight to the chase. The case is misguided, and thus any defense of it must compound error with error. It is misguided for a number of reasons.

I. THE EXTERNALIST PERSPECTIVE

No plausible theory of constitutional interpretation that anyone in this room or the United States would agree to apply as a general matter allows one to reach the conclusion the Court did:

i. The words of the Fifth Amendment command that "No person . . . shall be compelled in any criminal case to be a witness against himself."[4] Nowhere is there any reference to a warnings and waiver regime, and never has any member of the Supreme Court, notwithstanding Justice Scalia's provocation in dissent in *Dickerson*,[5] actually said that the Constitution so commands.

ii. Nor is there anything in the history of the Fifth Amendment that leads one to believe that the evil it was directed at was the absence of such a regime, or that any sort of original understanding, meaning, public understanding, etc., permit its words to bear such an interpretation.

iii. No serious argument about the structure of the Constitution generates warnings and waiver as a solution to a structural predicament.

And so on . . .

How do the defenders respond to this? As Professor Kamisar has, by asserting that the history of the Fifth Amendment is tangled, and obscure, and that such conditions "liberate" judgment.[6] Liberate judgment? What does that mean? What it meant to the supporters of the Warren Court in part was that one can ignore not only the constitutional history, but the language and structure of the Constitution as well, and pretty much do whatever you, the Court, thinks is right.

But there is nothing in the Constitution that allocates such a task to the Court, and if there is, it is indifferent to who the justices are. If the Court should do what it thinks right in 1966, it should do what it thinks is right in 2006, and at this stop, of course, the enthusiasts for *Miranda* get off the bus. But why? Why isn't judgment just as much liberated in 2006 as 1966? Indeed, why isn't it more so? *Miranda* has simply compounded the historical difficulties by adding yet another confusing, tangled, bizarre chapter.

I would be surprised if today we didn't hear various comments about how of course the Constitution's capacious language has room for a holding such as *Miranda*'s, and how it must be interpreted in the light of evolving, dare I say advancing, notions of enlightened justice and morality. I will also predict, however, that not a single person making such a point will refer to either the language, structure,

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[4] U.S. CONST. Amend. V.

[5] Dickerson v. United States, 530 U.S. 428, 447 (2000) (Scalia, J., dissenting).

[6] YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 36 (1980).

or history of the document. At the end, then, their claim will be that the Court should interpret the document consistent with the speaker's normative views—consistent, in short, with their biases and prejudices, however enlightened they may be, and ironically to the point of absurdity, the same people will object when a majority of the Court expresses different views from their own. After all, either your theory of interpretation is that the Court should do what it pleases or it should not. The rest of us, at any rate, will probably be unenthusiastic about a theory of interpretation that the Court is to do what it pleases so long as it pleases you.

In Professor Kamisar's response to my presentation of this paper at the symposium, he made only a single point, to wit that all constitutional interpretation involves, well, interpretation.[7] Where in the Constitution is the voluntariness test, or the exclusionary rule, he asked? If they are not there, aren't they just as illegitimate as the *Miranda* rules? This is a remarkable defense of *Miranda* because it amounts to no defense at all. It essentially is positing that the literal terms of the Constitution are unenlightening, and thus that any "interpretation" is as good as any other. But if any interpretation is as good as any other, *Miranda* is no more, although concededly no less, legitimate than any alternative. One loses the ability to criticize anything as a matter of constitutional law. This point, in turn, emphasizes how much the defenders of the Warren Court jurisprudence really are simply trying to impose their policy choices on the country through the guise of constitutional adjudication. Maybe everybody else is as well, but an argument such as this forfeits the ability to say that any decision is right or wrong. And thus it seems to me that Professor Kamisar has to admit that his own theory of constitutional interpretation leaves him incapable of criticizing as wrong any development inconsistent with *Miranda*.

So, if Professor Kamisar is right, he is wrong to criticize, as constitutional law, any of the developments he thunders against in his article. But he is probably wrong in any event. It is surely true that the language of the Constitution must be interpreted, but so, too, does any legal language. For centuries, the western world has been developing means of dealing with the ambiguity of language. I referred to a number of interpretive canons above. These do not decide the details of all cases, but they certainly indicate large areas of unproblematic application. Viewed from that perspective, is it really as hard to justify the voluntariness test as consistent with the language of compulsion as it is the warnings and waiver regime of *Miranda*? Of course not. And is it really so difficult to see the exclusionary rule as a remedial measure, and to remember in this context as in others that without remedies there may be no rights? Of course not. The mere fact that any interpretation is subject to some degree of creative activity by the interpreter does not mean that all "interpretations"

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[7] Yale Kamisar, Distinguished Professor of Law, University of San Diego, Presentation at the Ohio State Journal of Criminal Law Symposium: *Miranda* at Forty (October 6, 2006). Professor Kamisar was offered the opportunity to respond to my article, and he had the opportunity to revise his own article in light of the discussion at the symposium. I note this because I think it only fair in academic discourse that everyone be fully able to respond to all the views of the discussants. My discussion, in this article, of points debated at the symposium, meets this criterion for the reasons identified above.

are equivalent. Some respect better and some worse the meaning of language, the role of institutions, the relevant history, and so on. And as I have pointed out already, *Miranda* loses on these criteria. So, if Professor Kamisar is wrong in his constitutional theorizing, he is wrong to defend *Miranda*; and if he is right in his constitutional theorizing, *Miranda* has no defense. In either case, *Miranda* is defenseless on constitutional grounds.

II. THE INTERNALIST PERSPECTIVE

The case is gibberish on its own terms. I have developed this at length elsewhere[8] and will only summarize the argument here. There are two central problems:

i. The case is internally inconsistent. If the forces it is attempting to resist are so compelling that innocent people will confess, those forces will overwhelm whatever effect there may be of warnings and waiver. This may be one reason why *Miranda* has not had the dramatic effect anticipated for it by some, and another reason why defending the case nonetheless is peculiar.

ii. More deeply, and even more problematic, *Miranda* depends on a conception of free will that means freedom from the operation of reasons conditioning the choice.[9] Unless a person chooses truly freely, the choice is determined by its reasons, and why a person has a reason is determined by its prior reasons, and so on. So, a person must choose freely, but a choice to speak (or do anything else) for no reasons could only be done randomly, by an insane person or one in a catatonic state, or one at any rate that does not embody the notions of individuality, agency, and integrity that undergird what is at the heart of the idea that one should speak voluntarily if at all. And even if that is wrong, if there is such a thing as "choosing" to speak in the exercise of free will, it is always present when someone speaks. The will must make the muscles of the larynx contract and thus vibrate the vocal chords, and so on. So, speaking either always involves free will or it never does (because free will is a chimera), and thus any case premised upon the distinction is nonsense on stilts. By the way, I will be very happy to discuss the various philosophical responses to the free will problem by

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[8] Ronald J. Allen, Miranda*'s Hollow Core*, 100 NW. U. L. REV. 71 (2006).

[9] As the *Miranda* Court put it, "[t]he fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." 384 U.S. at 457. Further, "the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Id.* at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)). And finally, "[o]ur aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469.

> people such as Dennett, Frankfurt, Watson, and so on, but none of them get us out of the box that holds *Miranda*.[10]

How do the defenders of *Miranda* respond to this? When they acknowledge the questions at all, they say, as per Professor Kamisar, such things as:

> Some who write about police interrogation and confessions, especially those with a philosophy background, find it hard to resist touching upon the free will/determinism debate. But that has not been the level at which actual cases have been decided. Few, if any judges, I suspect, have pondered the questions philosophers have raised about "free will."[11]

So, there you have it. We can put aside free will—that is, we can put aside the very conceptual foundation of what it is we are talking about—because judges don't feel the need to ponder it when they are applying the law. But this is vacuous. The question isn't the cognitive habits of trial judges; it is the conceptual soundness of our categories. Whatever we tell judges depends on lots of things, but hopefully one thing it depends upon is our getting the nature of things right—or at least being able to explain what it is we are doing and why. The question is not whether trial judges need to ponder free will; it is whether we do, and the people who make the rules for trials judges. And there, the point is obvious. Of course we do. And had the *Miranda* Court pondered these issues more effectively or with greater understanding, maybe it would not have written such an indefensible opinion. Regardless, those of us now charged with contributing to the structure of the legal system plainly must attend to such issues, even if at the end of the day we structure a rule informed by, although perhaps not directly referring to such matters.

Indeed, that those structuring the legal system need to reflect on the problem of free will and the nature of rationality, even if trial judges do not, is so obvious that Professor Kamisar—the critic, remember, of my advancing these points—does so himself when it suits his argument. In his paper he quotes from Warren's opinion that "an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner," and "the entire thrust of police interrogation [in *Escobedo*], as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment." So, there you really have it: Criticize the critics of *Miranda* for their philosophical foolishness in noticing the importance of free will and rationality to this debate, but rely on the very same concepts when doing so may advance one's argument.

My pointing out the inconsistency in Professor Kamisar's stance toward the relevance of free will and rationality may with some justification be thought little more than effective rhetoric on my part, just another debater's trick and so on, since after all everybody makes mistakes. This, however, is a rather large mistake, and it fits into a pattern of similar odd argumentation in defense of the case. The other

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[10] *See* Allen, *supra* note 8.

[11] *See* Kamisar, *supra* note 3, at 164-65 (footnote omitted).

striking example is the almost comical inversion of the expected positions of the defenders and critics of *Miranda*, with the defenders of *Miranda* resting their argument for not overruling the case largely on the ground that it has not had a substantial effect,[12] an empirical point that Professor Kamisar seems to embrace as well![13] At some point, the lack of good and the accumulation of bad arguments begin to force the conclusion that the thing being argued for is pretty much defenseless. So it is with *Miranda*.

Indeed, there is more. But first, review the bidding. The defenders of *Miranda* advance no plausible theory of constitutional interpretation; indeed, they advance no theory at all explicitly. The theory they implicitly advance—do what you think is right so long as it is consistent with what I think—is obviously unacceptable. Their arguments are not tied to the language, structure or history of the document. Indeed, nowhere in typical defenses of *Miranda* is the Fifth Amendment even quoted, and probably because, again as Justice Scalia more or less pointed out, its language is a reproach to the decision. They ignore the conceptual black hole at the center of their arguments. And they regularly engage in inconsistent and odd forms of argumentation. What is one to say of such things? Perhaps one would do well to quote Professor Kamisar again, who in class often told of Thurman Arnold's quoting of Professor Thomas Reed Powell to the effect that: "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind."[14] That is exactly what occurs in the debates over *Miranda*. Its correctness obviously is inextricably intertwined with theories of constitutional interpretation and the meaning of free will, yet virtually never are such things mentioned in polite company.

These shortcomings of *Miranda* are so intense that its defenders try to shift the debate from *Miranda*'s constitutional stature to whether subsequent decisions or police actions are consistent with *Miranda*. In Professor Kamisar's paper, for example, he asserts that "it would be no exaggeration to say that in a significant number of instances, law enforcement officers are making a mockery of *Miranda*."[15] The question over and over again is whether *Miranda* has been respected, whether subsequent cases deviate from it, whether "coercion" for purposes of *Miranda* (whatever that means) is involved in contemporary police activities,[16] whether its

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[12] *See* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 NW. U. L. REV. 278 (1996); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996). *See also* John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998).

[13] Kamisar, *supra* note 3, at n. 108 seriatum.

[14] FRED SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 270 (1993) (quoting THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 101 (1935)).

[15] Kamisar, *supra* note 3, at 186.

[16] *Id.* at 185-86.

status as an important symbol should insulate it from reversal,[17] but never—not once—is the Fifth Amendment quoted. The argument essentially assumes the correctness of *Miranda*—more precisely, the correctness of a certain reading of *Miranda*—and argues that anything that deviates from that view is wrong, but this is obviously an inappropriate form of argumentation. One cannot establish that one case is wrong because of its inconsistency with another; either case might be wrong. An independent justification is needed.

From both an external and an internal perspective, then, the case is an unjustifiable mess, notwithstanding prodigious scholarly efforts over four decades to replace its wobbly foundations with something more substantial. And in fact the intellectual incoherence of the case and its defenses press even deeper. As you can tell from the commentary on the case, many of its supporters are disappointed in both the effect that it had and in many of the Court's subsequent cases, but why are they disappointed? Remember, the primary practical complaint of the pre-*Miranda* era was the ambiguity of the voluntariness test, and its failure to draw sharp enough lines (although the real problem was windowless interrogation rooms). Precision is a good thing, and in one sense *Miranda* is quite precise: give the warnings and get a waiver or you can't engage in custodial interrogation.

But that is what is occurring now, and yet the defenders of *Miranda* remain unhappy. The only way to understand this reaction is that they believe that the proper criteria are something other than merely giving the warnings and obtaining a waiver; something different, in other words, than they have been saying all along. Professor Kamisar himself says that today the police are circumventing and disregarding *Miranda*,[18] even though they appear to me to be hewing close to the line. Therefore, giving warnings and obtaining waivers are not the criteria, but then—**WHAT ARE THEY?** And, another irony, the answer that one might want to give to that question—that people should only confess as an exercise of free will—is not available to those like Professor Kamisar who disdain the significance of this arid philosophical debate. You cannot claim that we do not have to engage with the free will problem, and then claim that the failing of *Miranda* is that too many people are being compelled to incriminate themselves. And suppose this inconvenient truth is swept under the rug—how do we know whether too many people are being compelled to incriminate themselves (or anyone, for that matter)? The only way you could answer that question is by resurrecting the old and hated voluntariness test. Warnings and waiver in one case resulted in a compelled statement, but in another did not because the setting, or whatever differed.

Let's really be impolite and push even harder on this mess. Although never spoken, it is obvious what disappoints *Miranda*'s proponents: there are just too many confessions. Why aren't all those people who *Miranda* tried to benefit taking

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[17] *Id.* at 197 n.165.

[18] *Id.* at 184-88.

advantage of this legal regime? As Professor Kamisar notes, complaints abound that *Miranda* did not go far enough.[19] He seems to agree:

> I do not deny that a significant number of suspects would waive their rights and talk to the police even if the police fully complied with *Miranda*. A significant number would do so "because at some level they *want* to talk to police." I not believe, however, that not nearly as many would talk as do now.[20]

Fine, but what is the right number of confessions? Is it eighty out of one hundred? One out of one hundred? Zero out of one hundred? More importantly, where does the answer to that question come from if it does not come from sorting out those who do and do not exercise free will, or from sorting out the levels of pressure that may be brought to bear on an individual (the voluntariness test, in short)? There are no footnotes to the Fifth Amendment that say "compelled" means that the ratio of those who waive to those who do not can be no greater than four to one. Why would it be a better world if some randomly chosen set of individuals, who otherwise would confess, did not?

At the end of the day the defense of *Miranda* either rests upon the very issue of free will that its supporters dismiss or an unarticulated and completely insupportable view that only a certain ratio of waivers should be allowed. Professor Kamisar did not respond to this point in his remarks at the conference, and frankly I cannot imagine what rational response there may be (and thus I cannot give an anticipatory reply). If he does not at some point respond; he has conceded the game. If he does, the response will need careful scrutiny to see if it has any hope of resurrecting the intellectual ashes of *Miranda*.

There are a number of subsidiary issues that time does not permit me to examine. Professor Kamisar, for example, seemed most to object to the lack of equality between the rich and the poor and that many innocent people were being subjected to interrogations even though they didn't confess. Indeed, at one point he mused that perhaps for every guilty person interrogated, ninety-nine innocent people were as well.[21] We can discuss these points later in the day if anyone is interested. Suffice it to say that the equality principle cannot do the work here (the problem is that guilty rich people aren't confessing, not that guilty poor people are), and it would be absurd to suggest today that ninety-nine percent of the people that the police are interrogating are innocent. Most people arrested for serious crimes are charged and convicted—approximately seventy to seventy-five percent of those arrested for federal felonies,

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[19] *Id.* at 178 n.67.

[20] *Id.* at 192 (quoting George C. Thomas III, *Stories about* Miranda, 102 MICH. L. REV. 1959, 1999 (2004)).

[21] Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 732–33 (1963).

for example.[22] These points, though, have the advantage of moving the debate in the right direction—which is the costs and benefits of differing legal regimes. I will close with a few comments on such matters, and one other issue as well: if free will does not help resolve these issues, what sense can be made of the Fifth Amendment privilege?

I will begin with the last point. The only sense that can be made of compulsion is a hierarchy of influences that distinguishes the acceptable from the unacceptable. A person who spoke under the force of no influences whatsoever could only be a madman, and it is not possible to sort out "state action" from the complex mix of motivations that attends every sane act. Would we say, for example, that state educational programs designed to inculcate habits of good citizenship, and thus also inculcate a sense of guilt in those who commit crimes, makes a confession from a person exposed to those programs compelled? The only thing that can be done is precisely what the voluntariness test tried to do—array the forces brought to bear on an individual and work out the line separating the acceptable from the unacceptable inductively.

There remains, of course, the fear of the windowless interrogation room. There is surely nothing inappropriate about prophylactic court rulings on evidentiary grounds reducing the incentive for untaped interrogation. A court can typically decide the facts accurately only if it has reliable evidence. Magisterial interrogation, first analyzed by Paul Kauper, would suffice as well. This is often objected to on the ground that it violates a person's right to silence, but there is no such right. There is a right to be free from compelled self-incrimination. Nowhere does the Constitution even suggest that a person has a right to be free from reasonable inferences based on his or her behavior, including the choice not to cooperate with the state.[23]

The defenders of *Miranda* might make one last effort to turn a sow's ear into a silk purse. If I am right, they may point out, then I am really right, and every statement is compelled. Thus, there should be no confessions allowed. Not only would that solve the problem of the Fifth Amendment, but it would give the police the right incentives to investigate crimes in other ways. First, this again makes hash of the Fifth Amendment, which obviously distinguishes between incrimination and compelled incrimination. Moreover, the oft-stated suggestion that the police can just

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[22] *See, e.g.*, Bureau of Justice Statistics, U.S. Department of Justice, A Compendium of Federal Criminal Justice Statistics (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0203.pdf. In 2002, 124,074 people were arrested and 87,727 were convicted, which suggests about 71% of those arrested are convicted. "About three-quarters of those for which the investigation was concluded were prosecuted." *Id.* As a perusal of the Department of Justice's website will confirm, the story in the states is considerably more varied, but it is obvious that most arrests are of plausibly guilty people. Much has changed in constitutional law since the early 1960s, when Professor Kamisar was constructing first the justification for and then the defense of *Miranda*. It is no longer lawful to pick people up for questioning or to round up the usual suspects. Arrests have to be on probable cause, even for questioning, and so on. Whatever the power of Kamisar's concern about the innocent in 1963, the world today is different. One cannot rely on an argument whose vary foundation has been eroded by changed circumstances.

[23] There are details to be worked out, such as protecting against unfair use of a person's prior record, etc.

substitute other forms of investigation for interrogations, while true in one sense, is extremely misguided in another. Interrogations are a cheap and effective way to obtain information, and for what it is worth much of what some complain about in current police practice seems perfectly fine to me. To replicate their effectiveness would entail massive investments in other forms of evidence gathering, including some that would entail substantially increased intrusiveness into private lives (like enhanced surveillance through video cameras and the like). We would thus have to choose between less effective law enforcement or transfers of public dollars from other areas to law enforcement. There is, in short, no free lunch.

It is not police interrogations that are the problem; it is abusive police interrogations. It is a good thing that many, many people who commit criminal acts are too stupid or too arrogant to exercise their rights under *Miranda*.[24] We should not treat the serious matter of trying to limit criminality as a high school civics lesson in which the predominate issue is to see how we can get more and more people to obstruct legitimate police investigations. Rights are wonderful things, but so, too, is the ability—dare I say "right"?—to live one's life free from the predations of individuals who have no respect for your rights. I am almost inclined to say that it is a reproach to the *Miranda* Court that it conceived of rights as in opposition to the effort to construct civilized society rather than part of it, but I don't think that is quite right. In its defense, the Court saw horrendous cases of brutalization by those very forces of civilization whose virtues I appear to be extolling, and maybe it saw something like the *Miranda* rules as necessary to bring about the end of brutalization. And maybe the Court was right. But that was forty years ago, and we no longer inhabit that era. We can now see clearly both the strengths and weaknesses of our predecessors. Rather than bemoan the lost paradise, I suggest we learn and go forward. Whatever other functions they serve, birthday celebrations are often about leaving the follies of youth behind.

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[24] Kamisar complains that the police may try to persuade individuals to waive their rights. Kamisar, *supra* note 3, at 186-87. For the life of me, I see nothing objectionable about this at all, and it emphasizes how far this *Alice in Wonderland* story has progressed. It is certainly objectionable to torture people and hang them out of a window by their necks, Brown v. Mississippi, 297 U.S. 278 (1936), but that is simply of a different order from "explaining to the suspect (or persuading him) why it is in his best interest to talk to them and why it will be so much the worse for him if he decides not to do so." Kamisar, *supra* note 3, at 187 [Sheena—currently at p. 26, text preceding footnote 121] These two are equivalent if, but only if, no distinctions between the types of influences acting on an individual can be made. Why is persuasion, and even obfuscation, by the police "coercion," a term Kamisar invokes often? *Id.*